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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 129

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

vs.

WILLIAM H. TUNNICLIFFE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 8, 1937
CERTIORARI GRANTED OCTOBER 11, 1937

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TRANSCRIPT OF RECORD.

UNITED STATES CIRCUIT COURT OF APPEALS
FIFTH CIRCUIT.

WILLIAM H. TUNNICLIFFE,
Petitioner,

versus

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition to Review the Decision of the United States Board of Tax Appeals.

DOCKET No. 78714.

William H. Tunnicliffe, Petitioner,
vs.
Commissioner of Internal Revenue, Respondent.

Appearances:
For petitioner: H. M. Voorhis, Esq.
For Respondent: C. A. Ray, Esq.

DOCKET ENTRIES:

1935
Mar. 8—Petition received and filed. Taxpayer notified. (Fee paid.)
Mar. 8—Copy of petition served on General Counsel.

May 6—Answer filed by General Counsel.
May 10—Copy of answer served on taxpayer.
May 20—Motion for circuit hearing at Orlando filed by taxpayer. 5/21/35 granted.
May 20—Notice of appearance of H. M. Voorhis as counsel filed.
Dec. 17—Hearing set week of Feb. 24, 1935, Jacksonville, Florida.

1936

Feb. 24—Hearing had before Mr. Smith on merits—submitted. Amendment to petition allowed — amendment to petition filed — copies served. Petitioner's brief due 3/23/36—respondent's brief due 4/8/36—petitioner's reply April 23, 1936.
Mar. 19—Transcript of hearing of Feb. 24, 1936 filed.
Mar. 23—Brief filed by taxpayer. 3/23/36 copy served on General Counsel.
Mar. 30—Motion to correct transcript filed by General Counsel. 3/31/36 granted.
Apr. 27—Motion for leave to file reply brief—reply brief lodged—filed by General Counsel. 4/28/36 granted.
May 13—Reply brief filed by taxpayer. 5/13/36 copy served on General Counsel.
June 10—Memorandum opinion rendered—Charles P. Smith, Division 5. Judgment will be entered for the respondent.
June 10—Decision entered—Charles P. Smith, Division 5.
Aug. 31—Petition for review by U. S. Circuit Court of Appeals, 5th Circuit, with assignments of error filed by taxpayer.
Aug. 31—Affidavit of service of petition for review filed.
Oct. 2—Praecipe filed—affidavit of service attached.

2 PETITION.

Filed March 8, 1935.

United States Board of Tax Appeals.

William H. Tunnicliffe, Petitioner,
vs. Docket No. 78714
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, IT:AR:C-2:GLG-90 D, dated December 10th, 1934, and as a basis of his proceeding, alleges as follows:

1. The petitioner is an individual whose residence and address are Sanford, Florida. The petitioner's name, as given in the Notice of Deficiency sent by the Commissioner of Internal Revenue was W. H. Tunnicliffe. This petitioner, William H. Tunnicliffe is the same person as W. H. Tunnicliffe.

2. The Notice of Deficiency, a copy of which is attached hereto and marked, "Exhibit A," was mailed to the petitioner on the 10th day of December, 1934.

3. The taxes in controversy are income taxes for the calendar years 1931 and 1932, and for Two Thousand Seven Hundred Twenty-three and 78/100 ($2,723.78) Dollars.

4. The determination of taxes set forth in the said Notice of Deficiency is based upon the following errors:

A. That the Commissioner erred in determining that the petitioner was neither an officer nor an employee of the State of Florida for the years 1931 and 1932.

3 B. That the Commissioner erred in determining that petitioner's income on which deficiency tax was assessed for the year 1932 was earned and accrued during the year 1932.

C. That the Commissioner erred in determining that petitioner's income for the year 1932, upon which deficiency is assessed, has been held to belong to the petitioner in the suit instituted by the Comptroller of the State of Florida to compel the re-payment of said income.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

A. That the petitioner was appointed liquidator of the State Bank of Orlando & Trust Company, Orlando, Florida in the fore part of 1930; that he was appointed Liquidator for the Orlando Bank & Trust Company, Orlando, Florida in July of 1930; that he was appointed Liquidator of the Bank of Winter Park in July, 1930, under the provisions of Chapter 13,576, Laws of Florida, 1929, which Chapter prescribes the duties and compensation of a liquidator; that Section 19 of said Chapter provides, among other things, that the liquidator under the direction and supervision of the Comptroller shall take possession of the books, records and assets of every director of such bank, banker, banking firm, banking and trust company or corporation and in his name shall sue for and collect all debts, dues and claims belonging to it, and upon the order of a Court of competent jurisdiction, may sell and compound all bad or doubtful debts and sell all the real and personal property of the bank; that Section 21 of said Chapter provides, among other things, that the expenses of the liquidator shall be paid out of the assets of the bank

upon the distribution of the proceeds thereof,
4 and the compensation of the liquidator shall be fixed by the Comptroller, and shall be based upon the work actually necessary and performed, and shall in no case exceed five per cent of the cash collections; that Section 23 of said Chapter provides that the liquidator shall at all times be under the supervision and control of the Comptroller and subject at all times to summary, discharge and dismissal.

B. That during the years 1930, 1931 and 1932 he performed the duties of liquidator for the aforesaid banks and a few other small banks in Central Florida; that at stated intervals, he would remit to the State Treasurer of Florida, moneys received by him which were deposited by the said State Treasurer in a special deposit, for the use and benefit of the creditors of the bank for which the petitioner collected said moneys, which said special deposits were subject to the order of the Comptroller; that the petitioner, during the years 1930, 1931 and 1932 received from the Comptroller each month, certain stated sums, which monthly payments were not based upon the amount of money collected and remitted by the petitioner, but were more in the nature of a drawing account; that in the latter part of 1932, when the Comptroller of the State of Florida knew that his term of office would expire December 31st, 1932, he made a settlement with the petitioner for his services during the years 1930, 1931 and 1932, as liquidator of the aforesaid banks and several small banks in Central Florida, said money being paid from the aforesaid special deposits of the various banks; that while said payment was made in 1932, it was earned by the petitioner during 1930, 1931 and 1932, and said money was on deposit with the State Treasurer of Florida in the aforesaid special funds or deposits during that period of time.

C. That the present Comptroller of the State of Florida, to-wit, J. M. Lee, is suing the petitioner in

the Circuit Court in and for Leon County,
5 Florida at the present time on the ground that the petitioner was a general liquidator under Chapter 13,576, General Laws of Florida, 1929, and therefore confined to a salary of $6,000.00 per year; that said suit has not been terminated, but should it terminate favorably to the Comptroller, the petitioner will be compelled to return all money above $6,000.00 received by him in the year 1932, or suffer a judgment against him.

Wherefore, the petitioner prays that this Board may hear the proceeding and enter an order declaring the aforesaid assessments of deficiency illegal, null and void, and not authorized by the facts in this proceeding, nor the law applicable thereto.

WILLIAM H. TUNNICLIFFE,
Sanford, Florida.

State of Florida,
County of Orange:

William H. Tunnicliffe, being duly sworn, says that he is the petitioner above named; that he has read the foregoing petition and is familiar with the statements contained therein, and that the facts stated are true.

WILLIAM H. TUNNICLIFFE.

Subscribed and sworn to before me, this 6th day of March, A. D. 1935.

MARY B. HUFFAKER,
Notary Public, State of Florida at Large.
(Seal)
My commission expires: 3-21-38.

6 EXHIBIT "A."

SN-A

IT:AR:C-2
GLG:90D

Dec. 10, 1934.

Mr. W. H. Tunnicliffe,
Sanford, Florida.

Sir:

You are advised that the determination of your income tax liability for the year(s) 1931 and 1932, discloses a deficiency of $2,723.78 as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1932, as amended by section 501 of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing and filing of this form will expedite the closing of your return(s) by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING,
Commissioner,
(Signed) CHAS. T. RUSSELL.
Deputy Commissioner.

Enclosures:
Statement,
Form 870.

GLG;CC-1
1050M

7 STATEMENT.

IT:AR:C-2
GLG:90D

In Re: Mr. W. H. Tunnicliffe,
Sanford, Florida.

Income Tax Liability.

Years	Income Tax Liability	Income Tax Assessed	Deficiency
1931	$ 34.66	None	$ 34.66
1932	2,689.12	None	2,689.12
Totals	$2,723.78	None	$2,723.78

The reports of the internal revenue agent in charge at Jacksonville, Florida, copies of which were mailed to you, have been reviewed and approved by this office.

Careful consideration has been accorded your protest dated February 17, 1934, in connection with the findings of the examining officer; the information submitted at a conference held in the office of the internal revenue agent in charge on March 15, 1934; the further data contained in your protest dated September 17, 1934 forwarded to the agent's office in reply to Bureau letter of August 17, 1934; and the data submitted at the conference held in the agent's office on October 23, 1934.

You contend that the salaries of $5,833.33 and $25,237.36 received by you for the years 1931 and 1932, respectively, as Florida state bank liquidator are exempt from Federal income tax, and further, that if it is held that your compensation as a state bank liquidator is subject to Federal income tax, you are not liable for tax in an amount in excess of $6,000.00 per annum.

The Laws of Florida 1929, CH. 13576, section 19, amends section 4162, Compiled General Laws of Florida to provide that on becoming satisfied of the insolvency, unsoundness, or irregular activities of a State bank, the State Comptroller may, in his discretion, designate and appoint a liquidator to take charge of the assets and affairs of such bank and require him to give bond, and may dismiss him whenever he deems it necessary or advisable. Such liquidator is under the direction and supervision of the Comptroller.

Section 20 provides that the Comptroller
8 may provide for the administration of the affairs of institutions under the above section, by one general liquidator who shall be designated by the Comptroller as General Liquidator for several or all of the institutions in liquidation, whose compensation shall be paid by the Comptroller, to be paid in such proportions out of the assets of the institution whose affairs are being administered as the Comptroller may determine, not exceeding in the aggregate $6,000.00 per annum.

Section 21 provides that all expenses of any liquidator shall be paid out of the assets of such bank; that the compensation of the liquidator shall be fixed by the Comptroller and shall be based upon the amount of work actually necessary and performed and shall in no case exceed 5 per cent of the cash collections.

Information on file in this office indicates that during 1927 and subsequent years, you were from time to time appointed liquidator of a number of institutions. For your services in 1931, you received $5,833.33 and in 1932, $25,237.36. You were required to give bond as provided by the statute, but took no oath of office. Your compensation was paid by State warrants signed by the State Comptroller and State Treasurer, but such warrants were, apparently, drawn against a special fund created by the deposit of collections made by you.

Reference is made to article 643 of Regulations 77, and to Assistant General Counsel Memorandum 13488

published in Internal Revenue Bulletin Volume XIII, #35, dated August 27, 1934. This Memorandum provides that the compensation of a taxpayer who was designated and appointed by the State Comptroller of Florida as liquidator of each bank which he liquidated, is subject to Federal income tax. This ruling appears to exactly cover your case, and in accordance, therewith, your compensation received as state liquidator is subject to Federal income tax.

You state that the present Comptroller of the State of Florida is suing you on the ground that you were a general liquidator and therefore confined to a salary of $6,000.00, and that if the suit should terminate in favor of the Comptroller, you would be compelled to return all money in excess of $6,000.00 received by you in 1932, as state liquidator.

9 Information on file indicates that you are denying your liability for any damages or your liability to repay any amount received by you as compensation as a state bank liquidator; that there are now pending in the State Courts other suits similar to the suit which has been filed against you; and that no decision in any of these suits has yet been rendered.

Reference is made to Court Decision 499 published in Cumulative Bulletin XI-1, June, 1932, pg. 293, in which it was held that if a taxpayer receives earnings under a claim of right and without restrictions as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.

See also the decision of the United States Board of Tax Appeals, in the case of R. A. Rowan and Company, published in Volume 13, B. T. A., page 975.

In view of the above, it is held that amounts received by you for compensation as state bank liquidator are subject to income tax.

A synopsis of your returns as corrected follows:

1931

Computation of Tax.

Net income reported on return		$1,122.38
Add:		
1. Fees for services as liquidator of state banks		5,833.33
Total		6,955.71
Deduct:		
2. Interest on Liberty Bonds eliminated		85.00
Total net income adjusted		$6,870.71
Less:		
Dividends	$ 477.00	
Personal exemption	3,500.00	
		3,977.00
Net income subject to normal tax		$2,893.71
10 Normal tax at 1½% on $2,893.71		43.41
Less:		
Earned income credit		8.75
Tax Liability		$ 34.66
Tax previously assessed		None
Deficiency		$ 34.66

Computation of Earned Income Credit.

Earned net income	$5,833.33

Less:	
Personal exemption	3,500.00
Income subject to normal tax	$2,333.33
Normal tax at 1½% on $2,333.33	35.00
Credit of 25%	8.75

Explanation of Changes.

1. The inclusion of salary of $5,833.33 has been full explained above.

2. The amount of $85.00 reported on your return as interest from Liberty Bonds has been eliminated, inasmuch as this amount is not in excess of the exemption allowed for such interest.

1932

Computation of Tax.

Net income reported on return		$ 1,037.53
Add:		
1. Fees for services as liquidator of state banks		25,237.36
Total		26,274.89
Deduct:		
2. Liberty Bond interest eliminated		85.00
Total net income adjusted		$26,189.89
Less:		
Dividends	$ 587.00	
Personal exemption	2,500.00	
		3,087.00
Net income subject to normal tax		$23,102.89

Normal tax at 4% on $4,000.00	160.00
Normal tax at 8% on $19,102.89	1,528.23
Surtax on $26,189.89	1,000.89
Total tax liability	2,689.12
Tax previously assessed	None
Deficiency	$ 2,689.12

Explanation of Changes.

1. The inclusion in your taxable income of $25,237.36 represents the salary received by you as state bank liquidator and has been previously explained above.

2. Liberty Bond interest of $85.00 has been eliminated from your taxable income as explained for the year 1931.

A copy of this letter has been mailed to Mr. H. M. Voorhis, Orlando, Florida, in accordance with the authorization contained in your power of attorney running to him which is on file in this office.

GLG/CC-1

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12 ANSWER.

Received May 6, 1935.

Filed May 6, 1935.

(Title Omitted.)

The Commissioner of Internal Revenue, by his attorney, Robert H. Jackson, Assistant General Counsel for